

**Objection to Denial of Streamlined Mercury Variance and Issuance of  
NPDES Permit No. IN 0024520  
City of South Bend Wastewater Treatment Plant  
South Bend, St. Joseph County, Indiana  
2017 OEA 78, (16-W-J-4924)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2017 OEA 78 cite this case as  
*City of South Bend Wastewater Treatment Plant, 2017 OEA 78.*

**TOPICS:**

NPDES Permit renewal	General applicability
Streamlined Mercury Variance (SMV)	Effect of law
Great Lakes Initiative	Interprets
Wastewater discharging facility	Implements rule
Water quality-based effluent limitation (WQBEL)	Internal policies
Mercury	Procedures
Pollution Minimization Program Plan (PMPP)	Organization
Samples	Summary judgment
Consistently	Cross motions
Definition	I.C. § 4-21.5-3, <i>et seq.</i>
90 percent compliance rate	I.C. § 4-22, <i>et seq.</i>
Public comment	327 IAC 2-1.5
Public comment response	327 IAC 5-3.5
Rule promulgation	327 IAC 5-3-15
Agency statement	327 IAC 15-15
	Ind. Trial R. 23

**PRESIDING ENVIRONMENTAL LAW JUDGE:**

Mary L. Davidsen

**PARTY REPRESENTATIVES**

IDEM: Susanna A. Bingman, Esq.

Petitioner: E. Sean Griggs, Esq.; Frederic Andes, Esq.; Barnes & Thornburg LLP

**ORDER ISSUED:**

August 4, 2017

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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**City of South Bend Wastewater Treatment Plant**  
**South Bend, St. Joseph County, Indiana**  
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STATE OF INDIANA            )  
  )  
COUNTY OF MARION        )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: \_\_\_\_\_)

OBJECTION TO THE DENIAL OF  
STREAMLINED MERCURY VARIANCE and  
ISSUANCE OF NPDES PERMIT NO, IN0024520  
CITY OF SOUTH BEND  
WASTEWATER TREATMENT PLANT  
SOUTH BEND, ST. JOSEPH COUNTY, INDIANA.

Cause No. 16-W-J-4924

City of South Bend Wastewater Treatment Plant, )  
 Petitioner, )  
 Indiana Department of Environmental Management, )  
 Respondent. )

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER ON  
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on cross summary judgment motions as to whether Respondent, Indiana Department of Environmental Management, properly interpreted a rule’s term “consistently” by applying an internally-adopted compliance rate, so as to deny Petitioner City of South Bend Wastewater Treatment Plant’s June 1, 2016 Streamlined Mercury Variance Application as part of its National Pollutant Discharge Elimination System renewal. The OEA, being duly advised and having read the parties’ motions, briefs, and evidence, now enters the following findings of fact, conclusions of law and final order on summary judgment.

In sum, IDEM's application of the internally-adopted compliance rate fails for lack of rulemaking, but IDEM did follow legal requirements in issuing comments in the rulemaking it did conduct.

## **FINDINGS OF FACT**

1. On June 1, 2016, the City of South Bend Wastewater Treatment Plant (“South Bend”) applied to the Indiana Department of Environmental Management (“IDEM”) to renew its National Pollution Discharge Elimination System (“NPDES”) Permit No. IN0024520 for its Wastewater Treatment Plant (“WWTP”) at 3113 Riverside Drive, South Bend, Indiana. Along with its NPDES renewal application, South Bend applied to renew its Streamlined Mercury Variance (“SMV”).

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2. South Bend discharges into the St. Joseph River, which is located within the Lake Michigan drainage basin. *Respondent's Exhibit 3, p. 1*. Because it is within the Great Lakes System, South Bend is subject to 327 IAC 2-1.5, the Water Quality Standards Applicable to All State Waters within the Great Lakes System ("Great Lakes Initiative").
3. The parties do not dispute that South Bend's previous NPDES permit (as modified on April 19, 2013), included an SMV with an interim monthly average discharge limit for mercury limit of 2.7 ng/L.
4. In 2005, IDEM adopted the Streamlined Mercury Variance ("SMV") Rule. 327 IAC 5-3.5 *et seq.*
5. The SMV Rule was adopted because permitted dischargers, particularly Great Lakes Initiative dischargers, were not able to meet the applicable National Pollution Discharge Elimination System ("NPDES") permit limits for mercury for lack of economically-viable, end-of-pipe treatment options. *See Joint Stipulations at ¶2*.
6. The SMV Rule provides in relevant part, "An SMV shall be available for the duration of the NPDES permit issued to a wastewater discharging facility that has an NPDES permit in effect *containing a discharge limitation for mercury that cannot be achieved consistently by the facility.*" 327 IAC 5-3.5-2 (emphasis added).
7. IDEM requires a facility with mercury WQBELs in a NPDES permit to monitor for mercury six times annually. For purposes of a SMV application, this means that two years of mercury monitoring should include twelve samples. However, some facilities, like South Bend, may monitor mercury more frequently than required.
8. IDEM's June 23, 2016 letter notified South Bend that, based on a review of the data submitted by South Bend in its SMV Application, South Bend did not meet the applicability criteria under 327 IAC 5-3.5-2, and therefore, IDEM would not process the SMV Application further. *Respondent's Ex. 2*.
9. On June 30, 2016, South Bend supplemented its June 1, 2016 SMV renewal application with data demonstrating that, within the preceding two years, South Bend's WWTP registered two samples that exceeded the mercury water quality-based effluent limitation ("WQBEL") of 1.3 mg/L proposed in its 2016 renewal. *Respondent's Ex. 1*.
10. The effluent mercury data provided by South Bend in its June 30, 2016 SMV Application spanned over two years, from May 7, 2014 to June 8, 2016, for a total of twenty-four samples. *Id., Ex 1, p. 13-14*. Although only required to sample for mercury every other month, South Bend sampled more frequently. The data showed that two samples would have caused an exceedance of the monthly average water quality-based effluent limit ("WQBEL") for mercury of 1.3 ng/L. *Id.* A sample from November 26, 2014 was 2.1 ng/L; an April 13,

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2016 sample was 1.4 ng/L, *Id.* Although exceeding the monthly average WQBEL of 1.3 ng/L, the two samples were below the daily maximum limit of 3.2 ng/L. *Id.* The remaining twenty-two samples were below both the average monthly and daily maximum limits. *Id.*

11. South Bend's draft Permit was published for public comment from August 4, 2016 through September 5, 2016. *Respondent's Ex. 6, p. 1.* During the comment period, South Bend submitted a comment letter. *Id.* One of the comments stated that "the City believes a renewal of the SMV is justified for approval by IDEM per 327 IAC 5-3.5-2. . . . [W]e believe that the [ . . . ] exceedances do not demonstrate consistent compliance." The comment also included information about South Bend's plant and mercury discharges that justified the need for a SMV. *Id. p. 14.* IDEM's comment response mirrored the language from IDEM's June 23, 2016 letter sent to South Bend, which explained that because of the data submitted, IDEM determined that South Bend was not eligible for a SMV under the applicable rule. *Id., p. 15.*
12. On October 21, 2016, IDEM issued to South Bend a Renewal NPDES Permit No. IN0024520 ("the Permit"). Respondent's Exhibit 3. Part I.A.3 of the Permit includes a mercury limit of 1.3 ng/L as a monthly average and 3.2 ng/L as a daily maximum. The mercury WQBELs are based on the wildlife criteria in 327 IAC 2-1.5-8(b)(6), Table 8-4. The Permit requires South Bend to monitor for mercury every other month. *Respondent's Ex. 3, p. 7.* The Permit does not contain a SMV.
13. In refusing South Bend's application for a renewed SMV, IDEM concluded that the Petitioner no longer met the applicability criteria in 327 IAC 5-3.5-2 "because [the Petitioner] did not show that they could not consistently achieve the limitation." *Deposition Transcript of Jason House ("IDEM Dep.") at 9:12-13 (March 23, 2017).* IDEM's denial did not state an analysis as to whether South Bend's SMV application included a Pollutant Minimization Program Plan ("PMPP") which identified and minimized the discharge of mercury into the environment, and demonstrated that South Bend had or had not achieved progress toward the goal of reducing mercury from its discharge. However, in its proposed findings, IDEM states that "both parties agree that South Bend has continuously implemented its PMPP". *Petition, p. 3.*
14. Historically, IDEM had no formal or publicly-available interpretation for the phrase in the applicability criteria, "cannot be achieved consistently." *Joint Stipulations, ¶6.*
15. Without published or publicly-available notice, IDEM changed its interpretation of the applicability criteria in 2016. *IDEM Dep. at 27:19-29:23.* There is no evidence in the record that IDEM's interpretation was adopted after rulemaking.
16. South Bend's contends, without opposition, that for twelve years prior to its 2016 application of the 90% compliance rate, IDEM granted SMVs when an applicant had any exceedances of the mercury WQBELS during the preceding 24-month period.

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17. Notwithstanding the lack of any notice to permittees, IDEM started applying a 90% compliance rate as conclusive evidence of consistent achievement (or not) with the mercury limit. *Id. at 16:2–16; 26:8–12.*
18. Specifically, IDEM used the 90% compliance rate to refuse to process SMVs to three applicants: East Chicago Sanitary District, ArcelorMittal USA LLC, and South Bend. *Joint Stipulations, ¶¶9-10.*
19. IDEM technical staff's only documentation of the new 90% compliance rate was in an unpublished, internal Municipal SMV Checklist. *IDEM Dep. at 12:6–10; 27:19–29:23.*
20. Neither the Municipal SMV Checklist itself nor any other reference to the 90% compliance rate was ever published in the Indiana Register, accessible on IDEM's webpage, or otherwise publicly-available. *Joint Stipulations, ¶14–17.*
21. IDEM avers that the Municipal SMV Checklist was not used in the evaluation of South Bend's SMV renewal application. No designated evidence disputes IDEM's assertion.
22. The Municipal SMV Checklist provides in relevant part, "Generally, compliance is not consistently achieved only when 10% or more of the effluent data in the most recent two year period exceeds the monthly average." *See* Municipal SMV Application Checklist (undated).
23. IDEM performed no statistical analyses or tests to establish the 90% compliance rate. *IDEM Dep. at 29:17–31:24.*
24. IDEM was unable to provide any scientific or technical justification for the 90% compliance rate. *Id. at 28:17–34:2.*
25. IDEM's primary justification for the application of the 90% compliance rate is that the agency "was comfortable" with that rate. *Id. at 32:19–25.*
26. In three instances of SMV applications (East Chicago Sanitary District<sup>1</sup> ArcelorMittal USA, LLC), IDEM applied the 90% compliance rate. *Joint Stipulations, ¶9.* Where the applicant's compliance rate was greater than 90%, IDEM did not process the applicant's SMV application. *Joint Stipulations, ¶10.*
27. On November 4, 2016, South Bend timely filed a Petition for Administrative Review, Stay of Permit Conditions, and Adjudicatory Hearing ("the Petition") with OEA seeking review of the Permit.

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<sup>1</sup> SMV application submitted January 28, 2016, denied May 5, 2016.

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28. On December 19, 2016 this Court entered the Parties' Joint Agreement for Temporary Stay staying the mercury limits in the Permit, subsequently stayed until August 4, 2017.
29. In accord with the case management order, the parties filed Joint Stipulations on March 23, 2016, their Summary Judgment motions on April 28, 2017, their Responses on May 26, 2017, their Replies on June 9, 2017, and their Proposed Findings of Fact, Conclusions of Law and Proposed Final Orders on June 16, 2017. After independent review and confirmation, OEA adopts several of each parties' statements contained in their Proposed Findings of Fact and Conclusions of Law.
30. OEA finds each of the foregoing findings of fact to be undisputed and to be supported by the properly designated evidence.

**CONCLUSIONS OF LAW**

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* Petitioner City of South Bend, by legal counsel, timely filed their petition for administrative review. The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the environmental law Judge (the "ELJ"), and deference to the IDEM's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America* 347, 2004 OEA 123, 129. *See also Blue River Valley*,

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2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26, 41.

5. The OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tr. R. 56.
6. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed and issues of doubt resolved by the court in the fashion most favorable to the non-moving party. *City of Indianapolis v. Buschman*, 988 N.E.2d 791 (Ind. 2013) *see also* *Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind. 2011), *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). After the burden of proof regarding summary judgment has been established by the moving party, the burden shifts to the non-moving party to demonstrate through specific evidence that there lies a genuine issue of material fact. *Bushong* at 474, (2003). “[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact.” *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); *see also* *Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001) (“The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment . . . Speculation will not suffice.”). Still, the trial court’s decision will be assessed to ensure that the non-movant was not improperly denied his or her day in court. *Alexander v. Marion Cnty. Sheriff*, 891 N.E.2d 87, 92 (Ind. Ct. App. 2008) (quoting *City of Mishawaka v. Kvale*, 810 N.E.2d 1129, 1132-33 (Ind. Ct. App. 2004)), *trans. denied*. “We may affirm the grant of summary judgment on any basis argued by the parties and supported by the record.” *CFS, LLC v. Bank of Am.*, 962 N.E.2d 151, 153 (Ind. Ct. App. 2012).
7. Both Petitioner City of South Bend and Respondent IDEM have requested summary judgment. “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992); *see also* *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).
8. In sum, the parties each base their arguments for favorable summary judgment on the definition of the word “consistently”, as used in 327 IAC 5-3.5-2.

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**Regulatory Background**

9. On March 23, 1995, the United States Environmental Protection Agency (“U.S. EPA”) published its Final Water Quality Guidance for the Great Lakes System (“the Guidance”). 60 Fed. Reg. 15366. The Guidance required Great Lakes States, including Indiana, to adopt provisions consistent with the Guidance within two years of its publication. 60 Fed. Reg. 15372. One of the provisions under the Guidance is the water quality criteria for the protection of wildlife of 1.3 ng/L for mercury (“wildlife criteria”). *Id.* at 15412. Water quality criteria are used to establish enforceable WQBELs that are incorporated into individual NPDES permits. 327 IAC 5-2-11.5.
10. Indiana adopted the wildlife criteria at 327 IAC 2-1.5-8(b)(6), Table 8-4. The wildlife criteria only apply to waters of the State of Indiana within the Great Lakes System, which includes South Bend. 327 IAC 2-1.5-1.
11. The Guidance allows Great Lakes States to adopt water quality standard variance procedures that are discharger- and pollutant-specific. 40 CFR 132, Appendix F, Procedure 2: Variances from Water Quality Standards for Point Sources. Water quality standard variances are granted for a specified period of time, and are used when a State believes that “the existing standards are ultimately attainable.” NPDES Permit Writers’ Manual, Chapter 6, page 10 (Sept. 2010), available at [https://www.epa.gov/sites/production/files/2015-09/documents/pwm\\_chapt\\_06.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_06.pdf). Variances must be evaluated to ensure that “reasonable progress is made toward meeting the standards.” *Id.*
12. In October 2002, U.S. EPA approved Method 1631, Revision E, which is an analytical method that can measure the concentration of mercury below the wildlife criteria of 1.3 ng/L. 67 Fed. Reg. 65876 (Oct. 29, 2002); 27 Ind. Reg. 2884 (June 1, 2004). Before this time, the approved method could only measure at levels well above the wildlife criteria. 27 Ind. Reg. 2884 (June 1, 2004).
13. After the approval of Method 1631, and due to the lack of economically viable, end-of-pipe treatment options, it became clear that many of the wastewater discharging facilities within the Great Lakes Basin could not meet applicable NPDES permit limits for mercury. Therefore, the adoption of a mercury variance rule in accordance with 40 CFR 132, Appendix F, Procedure 2, became necessary. 27 Ind. Reg. 2884; *Joint Stipulations*, ¶ 2.
14. In consultation with a workgroup of all interested persons, IDEM adopted the SMV Rule at 327 IAC 5-3.5 in 2005. Without the expedited process offered by the SMV Rule, widespread and significant noncompliance was virtually certain. 27 Ind. Reg. 2884. Time was needed for facilities to develop and implement pollution prevention measures to reduce mercury in their effluent.



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15. The SMV Rule establishes “a streamlined process and application requirements for obtaining a variance from a water quality criterion used to establish a water quality-based effluent limitation for mercury in an NPDES permit.” 327 IAC 5-3.5-1.
16. The Applicability provision of the SMV Rule at 327 IAC 5-3.5-2 states:

“An SMV shall be available for the duration of the NPDES permit issued to a wastewater discharging facility that has an NPDES permit in effect containing a discharge limitation for mercury that cannot be achieved consistently by the facility.”
17. As part of the application for a SMV, the applicant is required to submit “[a]ll available mercury monitoring data . . . for the two (2) year period preceding the SMV application.” 327 IAC 5-3.5-9(a)(5).
18. The SMV Rule requires the creation of a Pollutant Minimization Program Plan (“PMPP”), which must be submitted with the application for a SMV. 327 IAC 5-3.5-9. The PMPP is the plan for development and implementation of the Pollutant Minimization Program (“PMP”), which is a program developed by a SMV applicant to identify and minimize the discharge of mercury into the environment. 327 IAC 5-3.5-3.
19. Once issued, the SMV remains in effect until the NPDES permit expires under Indiana Code (I.C.) § 13-14-8-9. Under 327 IAC 5-3.5-7(a), “[a]n eligible applicant may apply for a renewal of the SMV.” As part of the SMV renewal process, the permittee must again submit all available mercury monitoring data for the two year period preceding the SMV renewal application. IDEM may renew an initial SMV “if the applicant demonstrates that implementation of the PMPP has achieved progress toward the goal of reducing mercury from its discharge.” 327 IAC 5-3.5-7(b).

**IDEM’s determination to deny South Bend’s SMV Application**

20. The parties stipulated to many of the facts of this case and agree that the dispositive issue in this appeal is the proper interpretation of the applicability provision of the SMV Rule, 327 IAC 5-3.5-2, specifically, the term “consistently.”
21. Rules governing statutory construction also govern the legal construction of rules. *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996); *Indiana-Kentucky Electric Corp. v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005) (“IKEC”). Therefore, when construing a regulation, the Court must apply the rules of statutory construction.
22. The first question of statutory construction is whether the regulation is “clear and unambiguous on its face.” *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-4 (Ind. 2002). If there is no ambiguity, the inquiry ends, the regulation is not subject to interpretation, and must be applied and enforced by the courts as written. . *Indiana Dep’t*

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*of Revenue v. Horizon Bancorp.*, 644 N.E.2d 870, 872 (Ind. 1994); *Egan v. Bass*, 644 N.E.2d 1272, 1274 (Ind. Ct. App. 1994); *City of Fort Wayne*, 903 N.E.2d 493 (Ind. Ct. App. 2009); *Fry v. State*, 990 N.E.2d 429, 449 n. 28 (Ind. 2013); *IKEC*, 820 N.E.2d 771, 777. *Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 465 (Ind. 1993).

23. When the words in a statute or regulation are not defined, they must be given their plain and ordinary meaning. *Gibson v. Indiana Dep't of Corr.*, 899 N.E.2d 40, 58 (Ind. Ct. App. 2008). In the Indiana appellate courts, using a dictionary definition of a term is common when trying to determine the plain and ordinary meaning of a word. *See, e.g., D.R. v. State*, 729 N.E.2d 597, 599 (Ind. Ct. App. 2000) (citing *Blackmon v. Duckworth*, 675 N.E.2d 349, 351 (Ind. Ct. App. 1996)); *Indiana Office of Env'tl. Adjudication v. Kunz*, 714 N.E.2d 1190, 1193 (Ind. Ct. App. 1999).
24. "Consistently" is not defined in 327 IAC 5-3.5 in the context of the phrase "*containing a discharge limitation for mercury that cannot be achieved **consistently** by the facility*" as found in 327 IAC 5-3.5-2 (emphasis added). In sum, IDEM relies on the following sources to define "consistently" as usually, but not always.

Webster's 9th New Collegiate Dictionary defines "consistently" as:

1. in a consistent manner
2. often.

The same dictionary defines "consistent" as:

- a. possessing firmness or coherence
- b. marked by harmony, regularity, or steady continuity: free from variation or contradiction
- c. compatible (with)
- d. showing steady conformity to character, profession, belief, or custom
- e. tending to be arbitrarily close to the true value of the parameter estimated as the sample becomes large.

"Often" is defined as:

1. many times
2. frequently.

The Oxford English Dictionary Online defines "consistently" as: "in every case or on every occasion; invariably." Oxford English Dictionary Online, <http://en.oxforddictionaries.com/definition/consistently>.

A Thesaurus provides the following synonyms for "consistently": always, constantly, frequently, normally, persistently, regularly, routinely, steadily, typically. 2017 Dictionary.com, LLC, <http://www.thesaurus.com/browse/consistently>.

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25. South Bend challenges IDEM's interpretation of 327 IAC 5-3.5-2 and argues that "consistently" unambiguously means "always". In sum, South Bend relies on the following sources to define "consistently" as "every time" and "without fail".

- "in every case or on every occasion; invariably." OXFORD ENGLISH DICTIONARY ONLINE, available at <https://en.oxforddictionaries.com/definition/consistently>
- "constantly; always." WEBSTER'S NEW WORLD COLLEGE DICTIONARY, available at <http://www.yourdictionary.com/consistently#wiktionary>
- "marked by harmony, regularity, or steady continuity: free from variation or contradiction." MERRIAM-WEBSTER NEW WORLD COLLEGE DICTIONARY, available at <http://www2.merriam-webster.com/apps/apache/docs/cobrand/cgi-bin/mwdictsn?book=Dictionary&va=consistent> [collectively "Definitions"]

26. However, it is clear from both dictionary definitions and the thesaurus that "consistently" as used in 327 IAC 5-3.5-2 is ambiguous,<sup>2</sup> and additional rules of statutory construction must be applied. *In the Matter of: Objection to the Expiration of Individual NPDES/CAFO Construction Permit Animal Waste No. AW-5807, Farm ID No. 6523, Far Hills Dairy, LLC*, 2010 OEA 200, 203.

27. Although the interpretation of a statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, *id.*, here, OEA cannot confer automatic deference upon IDEM's interpretation of the SMV rule. The OEA must apply a *de novo* standard of review to determine the law at issue in this appeal without deference to any previous interpretation. *IKEC; In Re: New Fashion Pork*, 2012 OEA 1, 15; *In the Matter of: Objection to the Issuance of Sanitary Sewer Construction Permit No. 18375R*, 2007 OEA 64, 67 (April 17, 2007) (citing *Indiana Dep't of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993)); *In the Matter of: Request for Review Speedway Superamerica LLC*, 2006 OEA 40, 42-43 (March 15, 2006).

28. "If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature." *State v. Evans*, 790 N.E.2d 558, 560 (Ind. Ct. App. 2003). "The meaning and intention of the legislature are to be ascertained not only from the phraseology of the statute but also by considering its nature, design, and the consequences which flow from the reasonable alternative interpretations of the statute." *State v. Hensley*,

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<sup>2</sup> While it does not appear that any Indiana courts have grappled with the meaning of the term "consistently," courts in other jurisdictions have concluded that the term has multiple meanings. *See Wolkowitz v. Breath of Life Seventh Day Adventist Church (In re Lewis)*, 401 B.R. 431, 447 (Bankr. C.D. Cal. 2009) ("[T]he word 'consistent' is a fluid term and is not rigid. [The Statute] could have used the term 'conforming' or 'identical' or 'same,' but it uses the word 'consistent.'"); *In re iPhone 4S Consumer Litig.*, No. C 12-1127 CW, 2014 U.S. Dist. LEXIS 19363 at \*23 (N.D. Cal. Feb. 14, 2014) ("Plaintiffs do not elaborate on the meaning of the term 'on a consistent basis' anywhere in their complaint or their argument. Apple and the Court are left to guess whether Plaintiffs expected Siri to operate without fail, or more often than not, or at any other level below perfection.").

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716 N.E.2d 71, 76 (Ind. Ct. App. 1999). *See also IKEC*, 820 N.E.2d at 777, *citing Bourbon Mini-Mart, Inc. v. Comm’r, Indiana Dep’t of Env’tl. Mgmt.*, 806 N.E.2d 14, 20 (Ind. Ct. App.2004).

29. IDEM argues that the regulatory history of the SMV Rule, and the consequences that would flow from its definition of “consistently” in 327 IAC 5-3.5-2 as less than always. Since 2016, IDEM has applied this interpretation the SMV Rule to mean that a facility with only one exceedance over a two-year sampling period (made up of twelve samples) is not eligible for a SMV. But from the time of the regulation’s enactment in 2005, until IDEM applied its interpretation of “consistently” in 2016, IDEM granted such SMV applications.
30. 327 IAC 5-3.5-2’s term “consistently” is not clarified by IDEM’s reliance on the regulatory history of the SMV Rule. IDEM turns to its response to one comment received during the rulemaking process, that 327 IAC 5-3.5-2 be modified to read: “cannot be achieved <at all times> by the facility.”<sup>3</sup> IDEM also claims that it “deliberately” inserted the modifying adverb “consistently” to address a public comment that specifically requested that the words “at all times” be added to the SMV rule. IDEM Response Brief at 13 (citing 2 Ind. Reg. 644 (Nov. 1, 2004)). Specifically, the public comment submitted regarding the term “consistently” in the proposed SMV Rule states:

*Comment:* The applicability section at 327 IAC 5-3.5-2(a) is intended to ensure that the SMV is available only to facilities that cannot meet the current mercury discharge limits. However, as currently drafted, section 2(a) could be misconstrued to mean that the SMV would not be available to a facility that may have achieved the discharge limit a single time. To prevent this overly stringent application of the rule, section 2(a) should be revised with the underlined new phrases to read as follows: “A streamlined mercury variance (SMV) shall be available for the duration of the NPDES permit issued to a wastewater discharging facility that has a NPDES permit in effect containing a discharge limitation for mercury that, for technology-based reasons, cannot be achieved at all times by the facility.” 2 Ind. Reg. 644, 646 (Nov. 1, 2004).

31. In addressing this public comment, IDEM stated:

*Response:* The rule language in section 2(a) has been modified with the addition of “consistently” as follows: “A streamlined mercury variance (SMV) shall be available for the duration of the NPDES permit issued to a wastewater discharging facility that has an NPDES permit in effect containing a discharge limitation for mercury that cannot be achieved consistently by the facility.” *Id.*

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<sup>3</sup> The original draft Rule stated: “A streamlined mercury variance (SMV) shall be available for the duration of the NPDES permit issued to a wastewater discharging facility that has a NPDES permit in effect containing a discharge limitation for mercury that cannot be achieved by the facility.” 27 IR 2884 (June 1, 2004).

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IDEM's response, and the language it used in 327 IAC 5-3.5-2, did not suggest whether the chosen modifier, "consistently," meant "at all times" or "frequently."

32. Although IDEM regulations include the phrase "at all times" in numerous other regulations, *see* 327 IAC 5-2-8(9); 327 IAC 2-1-6(a)(1), (2), (b)(5); (g)(4); 327 IAC 2-1.5-8(b); 327 IAC 8-3.3-6; 327 IAC 8-3.4-17; 327 IAC 8-10-8(a); 327 IAC 15-4-2(a), IDEM argues that had the intent of the SMV Rule been "at all times," it would have stated "at all times." IDEM determination to use the term "consistently" in 327 IAC 5-3.5, *et seq.*, does not conclusively prove that "consistently" was chosen to signify something less than "at all times".
33. In the litigation of this cause, IDEM explained that it arrived at the 90% compliance rate after reviewing East Chicago's SMV application and the language of 327 IAC 5-3.5-2, it determined that a single exceedance over a two-year sampling period (made up of twelve samples) does not qualify a facility for a SMV. However, some facilities may take more samples than the minimum number required. South Bend, for example, included twenty-four samples in its SMV application. Therefore, IDEM converted its interpretation to a numeric compliance rate of 90% (rounding down from 91.6% to an even whole number). Since 90% allows for one exceedance per twelve samples (or two exceedances per twenty-four samples), any higher percentage would be the equivalent of at all times, and allowing for two exceedances per twelve samples would drop the compliance rate all the way down to 80%. Using this conversion, IDEM determined that evaluating compliance as 90% or higher was appropriate.
34. South Bend believes its interpretation should prevail to protect facilities from "unforeseen or uncontrolled circumstances" that may cause exceedances and lead to enforcement actions. *South Bend Response Brief*, p. 6. However, there is always the risk of "occasional noncompliance due to unforeseen or uncontrolled circumstances," and even perfect implementation of a PMPP cannot guarantee 100% compliance. IDEM argues that the intent of the SMV Rule cannot have been to grant a SMV because an entity may occasionally, and beyond its control, violate a discharge limit. To do so would practically guarantee a SMV indefinitely, which directly contradicts the underlying purpose of a variance and Indiana's water quality standards.
35. Instead, IDEM argues that the intent of the SMV Rule was to give facilities time to reduce mercury concentrations in their effluent through the implementation of PMPPs until compliance with the mercury WQBEL is "consistently" achieved. IDEM claims that it so stated during the rulemaking process: "IDEM is optimistic about the eventual possibility of achieving compliance with the water quality-based effluent limits through the implementation of pollution prevention measures." 27 *Ind. Reg.* 2884. However, the use of the term "consistently" does not clearly inform the regulated public that a single exceedance, or 90% compliance, is "consistently" meeting the mercury WQBELs. To require IDEM to issue SMVs to facilities that have successfully implemented PMPPs for years and with near

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perfect compliance does not disregard the purpose of the SMV Rule, Great Lakes Initiative regulations, and CWA variances generally.

36. In light of an ambiguous term in its regulation, IDEM's 2016 interpretation of "consistency", of 90% compliance, may function as IDEM's efforts to develop and apply an interpretation of "consistently" that gives effect to the regulatory intent of the SMV Rule. However, IDEM's current interpretation and application of 327 IC 5-3.5-2's "consistently" is not the product of a promulgated rule, but rather comes from an IDEM internal policy. The SMV application, nor any other publicly-available source, do not inform applicants of IDEM's interpretation.
37. South Bend asserts that IDEM re-wrote the SMV Rule and changed its original interpretation. *South Bend Brief*, p. 5-6. Until early 2016, IDEM never had an interpretation of "consistently" under 327 IAC 5-3.5-2. As noted in *IKEC*, "administrative agencies may make reasonable rules and regulations to apply and enforce legislative enactments", citing *Indiana Dep't of Env't'l Mgmt. v. Twin Eagle, LLC*, 798 N.E.2d 839, 847 (Ind. 2003). However, IDEM may only regulate by a new rule if the proper rulemaking procedures have been followed. *Id.* Thus, in establishing new rules, an administrative agency must comply with Indiana's Administrative Orders and Procedures Act (AOPA), *Indiana Code chapter 4-22-2*, which includes provisions for public hearings and review by executive branch officials. *Id.* at 847-48. "By contrast, agency actions that result in resolutions or directives that relate to internal policy, procedure, or organization, and do not have the effect of law, are not subject to the same requirements." *Id.* at 848. *IKEC*, 820 N.E.2d at 779, 780. See also *Ward v. Carter*, 2017 Ind. App. LEXIS 234, 2017 WL 2375548.
38. IDEM's 2016 interpretation of "consistency", of 90% compliance, is a rule, per AOPA. Per I.C. § 4-22-2-3(b), a rule is:

The whole or any part of an agency statement of general applicability that:

(1) has or is designed to have the effect of law; and

(2) implements, interprets, or prescribes:

(A) law or policy; or

(B) the organization, procedure, or practice requirements of an agency.

IDEM's 2016 interpretation of "consistency" as 90% compliance is a rule because it is an agency statement of general applicability that is designed to have the effect of law and implements or interprets the SMV rule. IDEM's 2016 interpretation of "consistency" as 90% compliance does not relate solely to IDEM's internal policies, procedures, or organization. In adopting its interpretation of the SMV rule, IDEM was required to follow the rulemaking procedures in AOPA. There is no evidence in the record before OEA that IDEM followed AOPA's rulemaking procedures when IDEM promulgated its 2016 interpretation of "consistency" as 90% compliance. Therefore, per I.C. 4-22-2-44, IDEM's 2016 interpretation of "consistency" as 90% compliance does not have the effect of law, and IDEM erred in applying this rule to

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South Bend's SMV application. Summary judgment should be granted to South Bend on this issue.

39. In its second claim, South Bend argues that IDEM did not adequately respond to comments made by the Petitioner during the notice and comment period for the Permit because IDEM did not provide a reasonable basis for the 90% compliance rate. *Petition, p. 4, 7; South Bend Response Brief, p. 7.*
40. 327 IAC 5-3-15 governs how IDEM must respond to comments received from the public on a draft NPDES permit. This rule states in full:
- “Contemporaneously with the issuance of a final permit under 327 IAC 5-3-14, the commissioner shall transmit a response to reach person having commented on the draft permit. This response to comments shall contain:
- 1) a brief description of and response to all significant comments on the draft permit raised during the public comment period, or during any hearing;
  - 2) a specific indication of which provisions of the draft permit have been changed in the final permit, and the reasons for the change; and
  - 3) a brief explanation of the right to request an adjudicatory hearing on the final permit.”
41. 327 IAC 5-3-15 only requires that IDEM respond to all significant comments—it does not specify in what manner and to what depth IDEM must respond.
42. As shown in the Post Public Notice Addendum to the Permit, IDEM did provide a response to South Bend's comments surrounding the SMV. Respondent's Exhibit 6, p. 14-15. IDEM's response mirrored the language from the June 23, 2016 letter sent to South Bend, which explained that because of the data submitted, the SMV Rule was not applicable to South Bend.
43. On cross-motions for summary judgment, each party bears the burden of proving whether IDEM properly determined that South Bend was not eligible for a SMV under 327 IAC 5-3.5. This Court finds the term “consistently” to be ambiguous. Regulatory history supports Petitioner South Bend's position that IDEM should have granted its SMV, as it did in the twelve years preceding internal adoption of the 90 percent rule. Petitioner City of South Bend Wastewater Treatment Plant has met its burden on its motion for summary judgment; Respondent Indiana Department of Environmental Management has not. As there is no issue of material fact, summary judgment in favor of South Bend is appropriate on the issue that IDEM should have granted its SMV application.

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44. On summary judgment, IDEM complied with its requirements under 327 IAC 5-3-15 by providing a response to South Bend's comment, and was not required to provide the reasoning behind its SMV determination. There is no genuine issue of material fact, and IDEM is entitled to judgment as a matter of law on this issue.

**FINAL ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that on the issue as to whether the Indiana Department of Environmental Management properly denied Petitioner South Bend Wastewater Treatment Plant's 2016 application for a Streamlined Mercury Variance under 327 IAC 5-3.5, *et seq.*, Summary Judgment is **GRANTED** as to Petitioner South Bend Wastewater Treatment Plant, and **DENIED** as to Respondent Indiana Department of Environmental Management. On the issue as to whether the Indiana Department of Environmental Management complied with requirements under 327 IAC 5-3-15 to respond to South Bend Wastewater Treatment Plant comment, Summary Judgment is **GRANTED** as to Respondent Indiana Department of Environmental Management and **DENIED** as to Petitioner South Bend Wastewater Treatment Plant,. All further proceedings are **VACATED**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED in Indianapolis, Indiana this 4th day of August, 2017.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge